

Staff note: The amendments to this section were requested last year by the Real Property Section of the North Carolina Bar Association as part of a packet of amendments mostly updating real property statutes to deal with *Obergefell*. Although the GSC did not approve the amendments as its own recommendations, it did agree to their inclusion in HB 227 (Preserve Tenancy by the Entirety) as Part II of that bill (which was not enacted). In light of the amendments to G.S. 12-3 by s. 35 of S.L. 2017-102 (the GSC's technical corrections bill), the proposed amendments to all but three sections from that packet are no longer strictly necessary. One of these sections was G.S. 29-30; the GSC is currently considering a partition-related amendment to that section.

The GSC at its last meeting raised the possibility of including the Real Property Section's amendments to G.S. 29-30 with its proposed amendment if the Section still wanted them enacted. I contacted John Mclean the Real Property Section, who was the point person for this originally, and he says they still want the amendments to this section.

SECTION #. G.S. 29-30 reads as rewritten:

"§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.

(a) ~~In-Except as provided in this subsection, in~~ lieu of the intestate share provided in G.S. 29-14 or G.S. 29-21, or of the elective share provided in G.S. 30-3.1, the surviving spouse of an intestate or the surviving spouse who has petitioned for an elective share shall be entitled to take as the surviving spouse's intestate share or elective share a life estate in one third in value of all the real estate of which the deceased spouse was seised and possessed of an estate of inheritance at any time during ~~coverture, except that real estate as to which the surviving spouse:~~coverture.
The following exceptions apply if the surviving spouse:

- (1) Has waived the surviving spouse's rights by joining with the other spouse in a conveyance ~~thereof, or~~thereof.
- (1a) Has waived the right to take a life estate in lieu of an intestate or elective share by an express written waiver thereof.
- (2) ~~Has released or quitclaimed~~ Has waived, released, or conveyed the surviving spouse's interest therein in accordance with ~~G.S. 52-10, or~~G.S. 52-10.
- (3) Was not required by law to join in conveyance thereof in order to bar the elective life ~~estate, or~~estate.
- (3a) Has executed a written declaration permitting the deceased spouse to convey or encumber the property without the consent or joinder of the surviving spouse.
- (4) Is otherwise not legally entitled to the election provided in this section.

...
(c) The election provided for in subsection (a) shall be made by (i) the filing of a petition in accordance with Article 2 of Chapter 28A of the General Statutes with the clerk of the superior court of the county in which the administration of the estate is pending, ~~or, or~~ (ii) if no administration is pending, then with the clerk of the superior court of any county in which the administration of the estate could be ~~commenced, commenced, together with the recording of a notice indicating the county and file number of the clerk's filing with the register of deeds in every county where real property to be claimed under the filing is located.~~ The election shall be made prior to the shorter of the following applicable periods:

...
(g) Neither the household furnishings in the dwelling house nor the life estates taken by election under this section shall be subject to the payment of debts due from the estate of the deceased spouse, except those debts secured by such property as follows:

- (1) By a mortgage or deed of trust in which the surviving spouse has waived the surviving spouse's rights by joining with the other spouse in the making ~~thereof;~~ ~~or thereof.~~
- (2) By a ~~purchase money~~ mortgage or deed of ~~trust,~~ trust given by the deceased spouse to secure a loan, the proceeds of which were used to pay all or a portion of the purchase price of the encumbered real property, regardless of whether the secured party is the seller of the real property or a third-party lender, or by a conditional sales contract of personal property in which title is retained by the vendor, made prior to or during the ~~marriage;~~ or marriage.
- (3) By a mortgage or deed of trust made prior to the ~~marriage;~~ or marriage.
- (4) By a mortgage or deed of trust constituting a lien on the property at the time of its acquisition by the deceased spouse either before or during the marriage.
- (5) By a mortgage or deed of trust on property with respect to which the elective life estate provided for in this section does not apply as provided in subsection (a) of this section.

...."

Explanation for these amendments:

Section ____ would amend G.S. 29-30, which allows a surviving spouse to take a life estate in one-third of the value of the deceased's real property instead of an intestate share or the elective share under G.S. 30-3.1. The amendments would (i) specifically recognize two additional forms used for one spouse to waive interests in the other's property; (ii) update terms (for example, "waived, released, or conveyed" rather than "released or quitclaimed"); (iii) require that if there is no estate administration, a notice of the surviving spouse's election be recorded in every county where affected real property is located; and (iv) clarify that the protection of life estates under this section against the deceased spouse's creditors does not extend to real property that is subject to a purchase money mortgage given by a lender, regardless of whether the lender is the seller or a third-party lender, and also that this protection against creditors does not apply to real property not included in the life estate.

Mr McLean also contributed the follow talking point:

Institutional lenders provide North Carolina citizens with the ability to finance the acquisition of homes across the State. [The proposed amendments to subsection (g)] clarify [its provisions] to meet the current expectations of lenders and real property parties.

For the GSC's information, here are the other two sections from that packet that were not enacted and are not *Obergefell* related:

SECTION #. G.S. 39-13 reads as rewritten:

"§ 39-13. Spouse need not join in purchase-money mortgage.

~~The purchaser of real estate who does not pay the whole of the purchase money at the time when he or she takes a deed for title may make a mortgage or deed of trust for securing the payment of such purchase money, or such part thereof as may remain unpaid, which A mortgage or deed of trust given by the purchaser of real property to secure a loan, the proceeds of which were used to pay all or a portion of the purchase price of the encumbered real property, regardless of whether the secured party is the seller of the real property or a third-party lender, shall be good and effectual against his or her the purchaser's spouse as well as the purchaser, without requiring the spouse to join in the execution of such the mortgage or deed of trust."~~

SECTION #. G.S. 39-13.7 is amended by adding two new subsections to read:

"(f) Notice that the real property held in trust receives immunity from the claims of separate creditors may be given in a statement in the conveyance of the tenancy by the entirety real property to the trust that the real property is held under this section and that as of the date of the conveyance, the requirements of subsection (b) of this section are met.

(g) A person entering a transaction involving real property held in trust under this section may request confirmation from the trustee whether the requirements of this section providing immunity from the claims of separate creditors are met at the time of the transaction."